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Supreme Court of the United States

OCTOBER TERM, 1933—No. 9

CULLEN FUEL COMPANY, INC., owner of the deck scow "CULLEN No. 32,"

Petitioner,

against

W. E. HEDGER CO., INC., bailee of the cargo,

Respondent.

REPLY BRIEF OF PETITIONER

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CORPORATE PRESS, INC., NEW YORK CITY

INDEX

ARGUMENT: PAGE

POINT I. The privity or knowledge of the corporation, under the limited liability law, is the privity or knowledge of the managing officers of the corporation 1

POINT II. The effect of the decision in the Hasler case, if it is to be followed, will be to largely nullify the provisions of the limited liability law 4

(1) The effect of the The Hasler decision upon harbor boats 5

(2) If The Hasler decision is correct then the right of steamship owners to limit against cargo losses is largely wiped out 6

(3) The effect of The Hasler decision upon contracts for the carriage of passengers 7

POINT III. As to the right to limit liability for cargo losses is governed by the provisions of the act of 1851, it is immaterial whether the contract is a personal one or not, as the sole question under the provisions of that act, is whether the loss or damage occurs with the privity or knowledge of the owner 9

POINT IV. If the right of a bailee to recover for damage to his cargo rests upon the right of possession, any right or action by the bailee sounds in tort and not upon a contract 12

POINT V. The petitioner is not debarred from limiting liability for the reasons set forth in the opinion in the District Court 13

List of Cases Cited

PAGE

Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334 11

Craig v. Continental Ins. Co., 141 U. S. 638 1

Cumberland-Cranford, 1927 A. M. C. 1615 ..... 8, 10

Dailey v. Carroll, 248 Fed. 466 5

Earl & Stoddart v. Ellerman's Wilson Line, 287 U. S. 420 ..... 7, 18

84-H, The, 296 Fed. 427 4

Fred E. Hasler, The, 65 Fed. (2d) [illegible] 2

Galileo, The, 54 Fed. 913 ..... 17, 18

Kathryn B. Guinan, The, 176 Fed. 301 16

Malcolm Baxter, The (France v. French Overseas Corp.) 277 U. S. 323 17

Text Books Cited

Corpus Juris, Vol. 6, page 1167 12

Statutes Referred To

Act Feby. 18, 1875, Rev. Stat. 4289, U. S. Code, Title 46, Sec. 188 5

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ARGUMENT

POINT I.

The privity or knowledge of the corporation, under the limited liability law, is the privity or knowledge of the managing officers of the corporation.

The privity or knowledge of a subordinate employee of a corporation is not the privity or knowledge of the corporation.

The law upon this subject has been well established for many years.

In *Craig* v. *Continental Insurance Company*, 141 U. S. 638, Mr. Justice BLATCHFORD stated as follows:

> "When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation. In Hill Mfg. Co. v. Providence & N. Y. S. S. Co., 113 Mass. 495, 499, 500, it was said that the object of the statute was to exempt the owners of ships from the onerous liability to which they

> were held by the common law, as common carriers or otherwise, for the acts or neglect of their servants or agents, or of third persons, without their own knowledge or concurrence; not to diminish their responsibility for their own willful or negligent acts."

The law as there stated has been uniformly repeatedly followed through the country, including the Second Circuit, as shown by the cases cited in our main brief.

But the Circuit Court of Appeals for the Second Circuit has recently declared that all the decisions upon this subject from *Craig* v. *Continental Insurance Company, supra,* down are erroneous and that the privity or knowledge of the most humble employee is the privity or knowledge of the corporation, and that the only acts which are not with the privity or knowledge of the owner are those contractual or tortious, of the master, crew or agent regulating the vessel who are beyond the control or supervision of the owner, that is, those who are in foreign ports.

The decision of the Circuit Court of Appeals for the Second Circuit referred to is that of *The Fred E. Hasler,* 65 Fed. (2d) 589. That decision was rendered on May 29th, 1933, after the certiorari in this case was granted.

MANTON, *C. J.,* stated as follows:

> "The purpose of the limitation of liability statute was to exempt owners, beyond the value of the vessel and freights due, from the consequences of the acts, contractual or tortious, of the master, crew, or agent regulating the vessel beyond the control or supervision of the owner. The contracts of the master or other agent on the voyage or in foreign ports bind only the ship. But the reason of that rule should forbid its application to contracts of charter hire entered into by an agent of the owner with full authority and under the immediate supervision of the owner no matter how subordinate a position the agent may occupy in the organization of the corporate owner. In most corporate enterprises, the routine of business estab-

lished by responsible officials leaves to subordinates full authority for the commission of the acts which create the corporation's contractual obligations. If the routine established gives a subordinate the authority, the corporation cannot insist that only more important officials should bind it to personal obligations. Its personal obligations should be determined by the authority of the one making the contract to transact that business and not by the importance of his official positions. Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770; Capitol Transp. Co. v. Cambria Steel Co., 249 U. S. 334, 39 S. Ct. 292, 63 L. Ed. 631; Sun Oil Co. Dalzell Towing Co., 55 F. (2d) 63 (C. C. A. 2), affirmed 287 U. S. 291, 53 S. Ct. 135, 77 L. Ed. 311; Great Lakes Towing Co. v. Mills Transp. Co., 155 F. 11, 22 L. R. A. (N. S.) 769 (C. C. A. 6)."

That decision is not only in direct conflict with every authority upon the subject, but it is unsupported by the authorities cited.

In *Pendleton* v. *Benner Line, supra,* the contract was made personally by Fields Pendleton, the owner of the vessel, and was signed by him.

In *The Capitol Transportation* case, *supra,* the contract was made by the manager of the Transportation Company.

The Sun Oil case, *supra,* did not involve limitation of liability at all and has no bearing upon the question involved.

In the *Great Lakes Towing Company* case, *supra,* the contract was made by the manager of the corporation.

In none of these cases is there the slightest suggestion of the rule which has been promulgated in *The Hasler* case. The question was not raised nor considered in any of them. It was not considered in the present case in the Circuit Court of Appeals.

The fundamental error in *The Hasler* case is that the Court has failed completely to distinguish between liability and limitation of liability, which is clearly pointed out by

Rogers, *J.*, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit in *The 84-H*, 296 Fed. 427, at page 431.

The contract of charter of the boat in this case was made by Sweet, an employee of the petitioner. No question is raised as to Sweet's authority to make that contract, but it does not follow at all that because Sweet, as an employee, had authority to make the contract that therefore the contract was a personal one of the corporation. A personal contract means more than a mere contract.

Suppose a grocer goes fishing and in his absence a customer buys from his clerk ten pounds of sugar, but the clerk, instead of giving the customer ten pounds, gives him only nine and a half pounds. Unquestionably the groceryman would be liable upon the contract made by his clerk, but by no stretch of the imagination can it be said that the grocer had made a personal contract, so as to incur a penalty for the wrongful act of his clerk.

POINT II.

The effect of the decision in the *Hasler* case, if it is to be followed, will be to largely nullify the provisions of the limited liability law.

The opinion in *The Hasler* case is open to the criticism which we have made of some of the decisions upon this subject, that is, the question of the right to limit liability has been considered an abstract proposition rather than one as dependent upon the plain language of the Acts of Congress.

The rule which is laid down in *The Hasler* case is, that in cases of cargo losses, the owner can limit liability only as against damages resulting from the acts of the agents of the corporation and of the master of the owner in a foreign port, and that the law has no application to the acts of the

employees of the corporation who are under the supervision of its managing officers.

If this rule is sound then it is obvious that the greater part of the limited liability law has been wiped out and that the vessel owner can limit liability only in a very few instances.

Probably the best test of the accuracy of an abstract proposition of law is to see how it will work upon actual application.

We, shall, therefore call attention to the application of the rule laid down in *The Hasler* case to cases of carriage of cargo, in three instances, viz.:

1. Harbor scows and lighters,
2. Steamships carrying cargo, and
3. Steamships carrying passengers.

(1) The effect of *The Hasler* decision upon harbor boats.

The Act of Congress on February 18th, 1875, Chapter 80, Section 1 of the Revised Statutes 4289, United States Code, Title 46, Section 188, provides that the limited liability laws shall apply to all seagoing vessels and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters.

The effect of the decision in *The Hasler* case is to nullify largely the limited liability laws, so far as concerns these harbor boats, and to cut down the right of limitation of liability within very narrow bounds.

The so-called captains or bargees of these harbor boats have none of the authority of a master of a steamer. Their duties are to attend to the eternal economy of the boat, including the pumping and the mooring, watching and looking after the lines. They have no authority whatsoever to enter into any contracts on behalf of the boat.

Dailey v. Carroll, 248 Fed. 466.

Consequently, it necessarily follows that the only persons who may make a contract for the carriage of cargo by these harbor boats are the owner and his subordinate employees. If a contract made by a subordinate employee is with the privity or knowledge of the owner and is his personal contract then, as an inevitable result, in no case can the owner of a harbor boat limit liability for cargo losses, notwithstanding that the act of 1875 says that he is entitled to limit his liability.

Under the decision in *The Hasler* case, about the only claims against which the owner of a harbor boat can limit liability are those resulting from the negligence of the bargee in attending to lines, etc., causing damage to property other than the cargo on board.

(2) If *The Hasler* decision is correct then the right of steamship owners to limit against cargo losses is largely wiped out.

In the first instance let us take the case of a vessel, engaged in the trans-Atlantic trade, lying in New York and owned by a corporation maintaining its principal office in New York City.

In these days, the master of a steamship very rarely signs a bill of lading for cargo. It is generally signed by some clerk employed by the owner of the steamship.

Under *The Hasler* case decision the owner cannot limit liability for loss to any cargo shipped under a bill of lading so signed.

Most of our steamship companies maintain offices in other cities. Suppose an agent of New York Steamship Company, in Chicago, signs the bill of lading, is that the personal contract of the steamship owner or is it not? The determination of that question might involve the consideration of many facts. We hesitate to express any opinion on the subject. If the agent of the owner in Chicago communicated with the head office in New York and received

authority to make the contract that might be the personal contract of the owner? But if he did not communicate with the head office in New York it might not be the contract of the owner.

Much cargo is received from New York for trans-Atlantic transportation under through bills of lading issued by railroad companies in the west. In that case, the law is settled that the bills of lading issued by the railroad companies are not personal contracts of the owner of the steamship.

It is so stated by Mr. Justice BRANDEIS, in delivering the opinion of this Court in *Earl & Stoddart* v. *Ellerman's Wilson Line*, 287 U. S. 420.

It is to be assumed from the language of the opinion in *The Hasler* decision the owner would be entitled to limit liability, where the contract of shipment is made abroad by the master or agent of the steamship company, although question might arise in those cases, if the master or agent had communicated with the owner before entering into the contract.

It seems inconceivable that Congress, in enacting the limited liability laws of 1851, so plain in its terms, ever intended to create such a muddle.

(3) The effect of *The Hasler* decision upon contracts for the carriage of passengers.

If a steamship line having an office in New York, through one of its ticket agents, sells a ticket for a trans-Atlantic voyage upon one of its steamers it cannot limit liability under *The Hasler* case.

It may be, that if the contract is made abroad the owner can limit liability.

Many passenger tickets are sold by the travel agencies. In New York City a large number are sold by those travel agencies for vessels which depart from New York. Are such contracts for transportation of passengers personal con-

tracts of the owner? Is there a distinction to be made between tickets sold by the travel agencies in New York City and elsewhere?

This question was presented in the case of *Cumberland* v. *Cranford*, 1927 A. M. C. 1615 (not reported in Federal Reporter).

In that case the ferryboat *Cranford*, belonging to the Central Railroad of New Jersey, was in collision, in the Hudson River, with the steamship *Cumberland*. A number of passengers on the *Cranford* were injured. It was held that the collision resulted from its fault.

The passengers on the ferryboat were traveling under tickets sold in the ordinary way by the ticket agents of the railroad company and those tickets covered transportation on the ferryboat from New York to New Jersey.

It was contended that the railroad company, as owner of the ferryboat could not limit liability, because it had made a personal contract by the sale of its tickets to the passengers upon the ferryboat.

THACHER, District Judge, held that the railroad company was entitled to limit its liability and said as follows:

> "To adopt the claimant's contention in this case would not only press the law far beyond any decided case which has been called to my attention, but would utterly destroy the intended effect of the statute which has been so often declared."

POINT III.

As the right to limit liability for cargo losses governed by the provisions of the Act of 1851, it is immaterial whether the contract is a personal one or not, as the sole question under the provisions of that Act, is whether the loss or damage occurs with the privity or knowledge of the owner.

We have discussed at some length in our main brief, and in the present brief the question of the effect of a personal contract of the vessel owner, as affecting his right to limit liability.

Our discussion of that question is not to be taken as the slightest admission that the personal contract for the carriage of cargo has the slightest bearing upon the right to limit liability for cargo losses, as under the Act of 1851, the sole test under that Act is whether the loss or damage occurred with the privity or knowledge of the owner.

We have discussed the cases upholding this doctrine of personal contract, because of the necessity, and not because we deem they have any bearing upon the question.

We have heretofore pointed out in our main brief that the decisions supporting this doctrine of personal contract may be due to the fact that the question has been considered as abstract propositions of law, rather than one to be determined by the plain language of the Act of 1851, and also to the fact that they are based upon the Act of 1884, which has no application to the right to limit for cargo losses.

This case involves more than the right to limit liability where there is said to be a personal contract of the owner, under which there is a so-called implied warranty of seaworthiness.

Under this doctrine of personal contract, the denial of the right to limit liability for cargo losses is not confined to

losses arising from unseaworthiness. If the doctrine of personal contract is logically carried out, the vessel owner cannot limit liability for any loss or damage whatsoever, if he has made a personal contract, no matter how that damage may arise, through collision, theft by the crew or otherwise.

The case of *Cumberland Cranford, supra,* is a logical application of this doctrine of a personal contract, because it was there contended that the owner of the ferryboat could not limit liability for injuries received by passengers on the ferryboat through collision, resulting from the negligence of the master of the boat.

Considerable time has elapsed since the Act of 1851 was passed.

Many cases concerning its application have been presented to the courts, but it is only within the few years past that there has been any suggestion of this modern doctrine of a personal contract of the shipowner, which deprives him of the right to limit liability for cargo losses. It seemed to be generally conceded for years that the right to limit liability for cargo losses depended, as the Act of 1851 expressly declares, upon whether the loss or damage resulted with the privity or knowledge of the owner.

But in the last few years we have become involved in subtleties and refinements of argument, in complete disregard of the plain provisions of the Act of 1851, in consequence of which, and notwithstanding the plain provisions of that Act, the right of the vessel owner to limit liability for damage to cargo has been largely cut down. If these more recent decisions, for instance, *The Hasler* case, are sound, we have the most extraordinary conditions resulting, which we have set forth above.

It is beyond belief that Congress, in passing the Act of 1851, ever dreamed that such a construction would be placed upon the plain terms of that Act, so as to create such a muddled condition as now exists under some of the decisions.

The terms of the Act of 1851 are clear and we are now asking the Court to wipe out these conflicting and troublesome decisions, which are in plain conflict with the provisions of that Act, and to declare the rights of the vessel owners to limit liability are to be determined by the plain provisions of the Act of 1851, under which the question is not whether the contract of shipment of carriage is a personal one, but whether the loss results with the privity or knowledge of the owner.

Some of the decisions under the limited liability laws seem to reflect opposition to the whole scheme of those laws.

The decision in this case, and in *The Hasler* case, so at variance with the plain terms of the statutes, indicate that such opposition may have played considerable part in the results which were reached.

But the question of the economic policy underlying the limited liability laws is not a judicial question, at all, but is a political one, lying solely within the province of Congress.

It has always been declared by this Court that these statutes were enacted for the encouragement of our mercantile marine and are to be construed accordingly, instead of being whittled away by subtleties and refinements of argument.

In our main brief we have called attention to the statement by Mr. Justice HOLMES in the *Capitol Transportation Company* v. *Cambria Steel Company*, 249 U. S. 334. He there spoke of the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of the owners or by too liberal an attribution of contracts as personally theirs.

It is difficult to comprehend the reason for objection to the limited liability laws. The general purpose of those laws is the same as that of the modern business corporation laws, although the limited liability laws are not so broad as the latter.

At the time the Act of 1851 was passed there were very few business corporations and Congress, in enacting the Act of 1851, was only anticipating the now generally prevalent business corporation laws.

There seems to be no objection to these business corporation laws but for some reason the objection to the scheme of the limited liability laws still continues without any apparent reason.

In *Flink* v. *Paladini*, 279 U. S. 59, Mr. Justice HOLMES said that the purpose of the Act of Congress was "to encourage investment by exempting the investor from loss in excess of the fund he is willing to risk in the enterprise." Modern corporation business laws have the same purpose.

POINT IV.

If the right of a bailee to recover for damage to his cargo rests upon the right of possession, any right or action by the bailee sounds in tort and not upon a contract.

In our original brief we have argued that the right of a bailee to sue for damage to a bailed article rests upon his right of possession, rather than upon his liability over.

The respondent says that we have not pointed out any difference which would follow. It is true that we overlooked, in our main brief, pointing out the distinction which would result, but that distinction is obvious.

The right of a bailee to sue for damage to the bailed article in his possession rests solely upon the wrong or tort committed. If the bailed article is damaged he may maintain an action in the case or if his possession has been disturbed he may bring an action in trover, replevin or detinue.

See *Corpus Juris*, Vol. 6, page 1167, and authorities there cited.

But in the present case the respondent, as bailee is seeking to recover under a contract, not for the carriage of cargo, but for the charter of the boat. The Circuit Court of Appeals has held that he is entitled to recover because of the so-called implied warranty of seaworthiness, which is said to be a part of the contract under which the boat was chartered by the petitioner to the respondent.

The respondent cannot sue as bailee for breach of that contract. His only right of suit, on his own behalf, is for breach of the charter party. That contract is no part of the contract of carriage between the respondent and the owner of the cargo, whose rights apparently the respondent is attempting to enforce in the present case.

POINT V.

The petitioner is not debarred from limiting liability for the reasons set forth in the opinion in the District Court.

In the District Court, WOOLSEY, *J.*, denied the right of the petitioner to limit liability upon certain grounds.

The Circuit Court of Appeals has held that the petitioner could not limit liability, but upon grounds entirely different from those announced in the District Court.

The certiorari was granted in this case by reason of the conflict between the decision of the Circuit Court of Appeals and the decisions of other courts upon certain legal questions.

The respondent, however, now claims that he is entitled to have this Court determine whether or not the petitioner can limit liability because of the reason set forth in the opinion of the District Judge, although no certiorari has been presented by the respondent to review the decision of the Circuit Court of Appeals upon that ground.

Although no certiorari was applied for by the respondent in this case to raise the question which is now presented, we

assume that this Court may examine the whole case, including the opinion of the District Judge if it so desires.

In view of the fact that the consideration of the opinion of the District Court will require considerable examination of the facts of the case, while the certiorari was granted to determine certain questions of law, it is to be assumed that this Court will be reluctant to hear any extended discussion of the facts of the case.

It is stated in the respondent's brief (p. 9) that "both courts below have found that the scow *Cullen No. 32* was unseaworthy at the time she went under charter to respondent. Petitioner does not now question these findings of fact."

The above statement is quite erroneous, as will appear by our main brief, where we stated that we would admit for the purpose of this case that a presumption of unseaworthiness arose which had not been overcome by the petitioner.

The distinction would be quite unimportant if the respondent were not now raising the question that petitioner cannot limit liability under the decision of the District Court.

WOOLSEY, *J.*, found as a fact that the boat was unseaworthy for one of two reasons: (1) that there was water in the scow when she was delivered to be loaded alongside the steamship *Berk* unknown to Hedger or the stevedore, or, (2) that a leak existed in her starboard after corner or near it either at her stern or her side (Record, p. 121).

Later in his opinion he seemed to eliminate the first ground of unseaworthiness stated above and to hold that the boat was unseaworthy because of a leak in her after corner.

There is not the slightest evidence in the case justifying or supporting these findings of fact in the District Court. There is no evidence whatsoever that there was any water in the boat or that there was a leak in or about her after corner.

There was an issue of fact in the case as to whether the cargo was properly loaded, but after the Court found that

the cargo was improperly loaded, as the scow careened without any evident cause, there was a presumption of unseaworthiness. That we admit and no more.

In the opinion of SWAN, *J.*, in the Circuit Court of Appeals it is said that unless the scow leaked her list would not have increased as it did after the loading and that "we think that the finding is supported that the scow was leaky, or subject to leaks, as the pressure of her load increased her draft when the cargo was put on board" (fol. 351).

The statement there made that the boat became subject to leaks as the pressure of her load increased her draft was unsupported by any evidence and was pure conjecture on the part of the Court. In fact it seems to be in direct opposition to the evidence. At the time the boat careened she had only about 375 tons on board, although her carrying capacity was 550 to 600 tons, and until a few days before she had been lying loaded with a full cargo of brick.

These findings of fact were not unsupported by the evidence but were unnecessary because as we frankly admit the careening of the barge under the circumstances raised a presumption of unseaworthiness and we are also willing to admit for the purpose of this case that that presumption was not overcome by the petitioner, although it is somewhat difficult to reconcile such a conclusion with the conclusion of the District Court in reference to claim of the Long Island Railroad Company for damage to its wharf and carfloat. So far as concerns that claim the Court held that the careening of the barge raised a presumption of negligence, under the rule of *res ipsa loquitur*, but that the petitioner had overcome that proof by its evidence. It is somewhat difficult to understand why, if the evidence was sufficient to overcome the presumption of negligence so far as one claim is concerned, it was not sufficient to overcome the presumption of unseaworthiness on the other hand.

Both the Circuit Court of Appeals and the District Court seemed to think it necessary to find the exact cause of the alleged unseaworthiness of the boat, although there was no evidence of actual unseaworthiness, whatsoever. Accidents of this kind sometimes happen which defy discovery as to the cause.

In the *Kathryn B. Guinan,* 176 U. S. 301. The boat cut capers somewhat similar to those in the present case.

HOUGH, *J.*, in the District Court, stated as follows:

> "Such vessels do occasionally and unaccountably spring leaks and suddenly sink, this accident must be relegated to that small but real class."

In the Circuit Court of Appeals, Second Circuit, WARD, *J.*, stated as follows:

> "Such extraordinary behavior was hardly to be looked for, and yet something like it has occurred before, as may be seen from the cases of A Scow Without a Name, 7 Ben. 384, Fed. Cas. No. 12,554; and The On The Level (D. C.), 128 Fed. 511."

The respondent in an effort to sustain the finding of the District Court makes the following statement in its brief (p. 35):

> "The rule is well settled that the failure to conduct a proper and sufficient examination of a vessel before loading cargo upon her, or before letting her under charter, is sufficient to render her owner in 'privity or knowledge' of her unseaworthy condition, if cargo sustains damage through the vessel's unseaworthiness."

If such a rule exists it is real news to the admiralty bar. Frankly we never heard of it and we emphatically deny the existence of any rule of law of that kind.

The error in that statement is due to confusion on the part of respondent as to the provisions of the Harter Act and of the Limited Liability Law.

Under the provisions of the Harter Act the vessel owner is not liable for losses to cargo, resulting from errors in managing and navigation, etc., provided he has used due diligence to make the vessel seaworthy. Under the limited liability law no such rule prevails but the right to limit liability depends upon whether the unseaworthiness is with the privity of knowledge of the owners. The two acts have no connection whatsoever. The Harter Act affects the preliminary question of liability and the Limited Liability Laws are concerned only with the liability when established.

The distinction between the two acts and the lack of connection between them is clearly pointed out in the opinion of SWAN, *J.*, in *The Galileo*, 54 Fed. (2d) 913.

The respondent attempts to support this above alleged rule of law by quoting only partially, and in, such way as to cause misunderstanding, from the remarks of Mr. Justice STONE in *The Malcolm Baxter, Jr.* (*France* v. *French Overseas Corp.*, 277 U. S. 323).

Not only is the quotation in respondent's brief (p. 35) as to the language of Mr. Justice STONE misleading, but the respondent falls into further error by stating it was there held by this Court that the alleged rule above mentioned existed. As a fact, Mr. Justice STONE after referring to the decision of the Courts below said: "The correctness of this determination is not raised on the petition here."

What Mr. Justice STONE actually said in that case was as follows:

> "Both courts below agreed that the Baxter was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability

> under the Harter Act, Act of February 13, 1893, chap. 105, 27 Stat. at L. 445, U. S. C. title 46, Sec. 190, and acts permitting limitation of liability to the vessel and pending freight. Rev. Stat. Sections 4282-4289, U. S. C. title 46, Sections 182-188. The correctness of this determination is not raised on the petition here."

The above remarks of Mr. Justice STONE under the circumstances were but dictum, but it is impossible to read them as stating that the vessel owner cannot limit liability if he has failed to use due diligence to make the vessel seaworthy. It is quite apparent from the context of the above remarks of Mr. Justice STONE that what he said was that the vessel owner was not entitled to exoneration under the Harter Act because he had failed to use due diligence and that furthermore he was not entitled to limit liability under the Limited Liability Laws.

In *Earl & Stoddart* v. *Ellermans Wilson Line,* 287 U. S. 420, Mr. Justice BRANDEIS made the following statement:

> "The courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of the owners the breach of what *in other connections* is held to be a non-delegable duty. Nothing contained in the opinion of this court in The Malcolm Baxter, Jr. (France v. French Overseas Corporation), 277 U. S. 323, 72 L. Ed. 901, 48 S. Ct. 516, is to be taken as indicating a different view" (244-45). (Italics ours.)

It is true that the opinion of the Circuit Court of Appeals stated very briefly that the *Baxter* was unseaworthy and that fact could have been discovered by due diligence.

No authorities are cited in support of that proposition and it is contrary to the well established law upon the subject.

In a later decision of *The Galileo,* 54 Fed. (2d) 913, Mr. Justice SWAN, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit considered this whole

question and discussed the decision of this Court in *The Malcolm Baxter* case, and placed upon it an entirely different construction than that which is placed upon it by respondent. He also clearly pointed out that the right of the owner to limit liability was not based upon the question whether he used due diligence to make the vessel seaworthy but whether the unseaworthiness was with his privity or knowledge, and so impliedly overruled the remarks of Circuit Court of Appeals in the *Malcolm Baxter* case.

We shall now proceed to consider as briefly as possible the respondent's arguments that the petitioner should be denied the right to limit liability for the reasons given by WOOLSEY, *J.*, in the District Court.

The respondent says in the first instance that the examination made of the boat by Sweet, the petitioner's employee, was insufficient. It is said that Sweet merely "looked" at the boat, in an effort to create the impression that he simply glanced at the boat and no more.

The evidence in the case is so different, that it is somewhat difficult to comprehend why such an argument should be made.

The boat was only a floating box (Record, p. 17) which carried cargo only on her deck and none in her hold. She had no lining or no covering over the planks on her sides or ends and no covering over her bottom. If there was any leak in her hull it would have been quite apparent upon inspection.

Sweet went down into the hold of the boat and spent three-quarters of an hour in making an inspection of the boat with the aid of an electric flashlight (Record, p. 21). He examined the deck beams, and the planks on her sides, to see whether there were any leaks in them or whether she had any planks broken. He also examined her bottom and found no injuries or leaks of any kind whatsoever (p. 22). He said that the boat was in good condition and not leaking

(p. 19). He also examined her outside and said as far as he could see she was in good condition there.

His evidence as to her condition is confirmed by that of Gardner, a marine surveyor, who examined the boat when in a drydock, to which it was taken after the accident. He testified that the boat had longitudinal bulkheads in her hold, and that boats of that type of construction were stronger than those whose decks were supported by X braces (p. 83).

He said that he could find nothing in her condition at that time, which would have caused the accident (p. 88).

He testified that the oakum was in good condition (p. 94) and that except for the injuries received the boat was generally in good condition (p. 95).

There was no denial of his evidence.

WOOLSEY, *J.*, in the District Court, found that the inspection by Sweet was faulty and defective in a most curious way. He found, without any supporting evidence whatsoever, that there was a leak about the after corner of the boat and he then found that Sweet's inspection of the boat was faulty because he did not discover that imaginary leak.

The Circuit Court of Appeals having its attention called to the fact that there was no evidence supporting the statement in the opinion of the District Court, that there was a leak in the after corner of the vessel, suggested if it did not actually find, that the accident was due to leaks resulting the pressure of her load increased her draft. That conclusion was purely conjectural, but if true the leaks which were developed in that way could not have been discovered by any inspection whatsoever.

Respondent further argues that Sweet was not a proper person to make an inspection and argues that he had never built boats and was not an expert marine surveyor. This is the first time that we have ever heard it suggested that only marine surveyor can inspect a boat of this kind to determine

whether it is leaking or not. If these boats leak that fact will soon be developed either by pumping by the bargee, or, if there is any leak it would be discovered by an examination by the most inexpert person, because an excessive amount of water would be found in the bottom, entirely open to view. It would be just about as sensible to suggest that every time a washerwoman used a tub she is under the obligation to call in an expert cooper to inspect the tub to see whether it is in good condition or not.

Sweet, however, had experience in work of this kind and he was in charge of a gang of four men at the plant maintained by petitioner at 29th Street, for the purpose of making all ordinary repairs to its boats, above the light water line.

Respondent also complains that no test of the boat was made to ascertain her seaworthy condition. What respondent means by that argument we do not know, as we have never heard of any tests of such boats, except an examination of them such as was made by Sweet.

Respondent has argued that Sweet was required to use a picker to find out whether the oakum was in good condition, but the Circuit Court of Appeals said that it was not necessary to do so. But even if Sweet's examination was defective the petitioner is still entitled to limit liability under the cases which hold that the owner of a boat may delegate the duty of inspection to another person and that if the other person is negligent in the inspection that negligence is not within the privity or knowledge of the owner.

We have cited the cases upon this point in our main brief.

Petitioner goes further and contends that Sweet was a managing officer or agent of the petitioner. In the effort to sustain that contention the respondent has promoted Sweet from a mere employee into a managing officer by saying that he was the Marine Superintendent of petitioner.

Sweet said that he was the "superintendent of the marine department" of the petitioner, which was apparently a title

by courtesy. His authority is to be determined by the evidence, which shows that Sambraus, the vice president of the company, was really the managing officer of the company so far as concerns its boats.

He testified that he usually made the examination of the boats and that it was part of his duty at the time this accident occurred, but on this particular occasion he left the inspection to Mr. Sweet (Record, p. 74) (no doubt because of Sambraus' absence).

Mr. Sambraus testified as to Sweet's duty (p. 74):

> "Q. Was Mr. Sweet the manager of the work that you describe as taking care of the repair of your boats? A. Well, sort of superintendent of men, for he was continually there.
>
> Q. Who was his immediate superior in that work? A. Myself, personally."

The petitioner maintained a small force of about four men who did repair work under the supervision of Sweet.

Respondent also contends that petitioner should be denied its right to limit liability because it failed to produce records showing just when the boat had been in dry dock prior to this accident and the repairs which were then made. Sweet said that the boat had been in dry dock for repairs within less than a year before the accident either at Jersey City or Hunts Point, and that he thought that it was about eight months before the accident.

Petitioner, deeming the records of the dry dock to be irrelevant for the reason which we shall state hereafter, did not produce those records, which seemed to antagonize the Judge of the District Court who devoted considerable attention to the subject in the opinion and the respondent now goes into that question at length.

The Circuit Court of Appeals did not seem to think this question of any importance, saying (p. 133):

"Every inference points to the belief that the leaks appeared when the scow was submerged by her load, hence we put little weight on the failure of the Cullen Company to produce records of the dry dock repairs."

The records of the repairs of the dry dock would have been of no value. The men at the Cullen plant did all the necessary repairs to the boat above her light water line, that is when she was drawing about two feet. The only repairs which were made by the dry dock were on the bottom of the boat, and about two feet above it.

If the accident was caused by the leaking of the boat as found in the District Court that leak must have been above the light water line, and for that reason any record of repairs made on her bottom would have been quite irrelevant, although the District Court Judge laid such great stress upon the failure to produce the records of those repairs.

The District Judge found that the petitioner was not entitled to limit liability because it did not make more frequent inspections of the boat.

No authority is cited in support of that proposition and it seems to have been the result of confusion in the mind of the Court, between the provisions of the Harter Act and the Limited Liability Law which we have already pointed out.

Just how frequently a boat of this kind should be examined in order to permit the owner to limit liability does not appear in the opinion of the District Court, but the respondent contends that it is the owner's duty to make an inspection every time a boat is chartered, or every time cargo is loaded upon it, even if she is under charter at the time.

Certainly such an argument cannot be given any serious consideration. Charters of these boats in New York Harbor are generally made for an indefinite period and until the return of the boat. Sometimes the charter lasts for a few days only, sometimes for a week, sometimes for a longer time.

According to respondent's contention, therefore, even if the boat had been under charter only for a week and has carried her cargo without the slightest trouble, before loading any other cargo upon it the owner is compelled to have the boat examined by an expert marine surveyor, and possibly that the boat must be sent to a dry dock upon each occasion for a thorough examination.

The fallacy of such an argument is too obvious to require any discussion.

Under the rules which the respondent lays down a man is required to examine his watch every time he winds it up for the purpose of ascertaining its condition.

In conclusion we desire to call attention to the following finding of the Circuit Court of Appeals (p. 132):

> "In the case at bar the Cullen Company had no actual knowledge that she was in a leaky condition when sent out."

Respectfully submitted,

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